tion that Congress has no power to change the rules of evidence or practice[23] in State courts or invalidate their proceedings,[24] such a power being inconsistent with the free existence of state tribunals.[25] The authority of these cases on the exact point in issue is, of course, merely conjectural.

THE DUTIES OF PUBLIC SERVICE COMPANIES *Inter Se*.—In the conduct of their business, public service companies frequently enter into contracts with other public service companies, both for the establishment of an auxiliary, or dependant service, and for the formation of a connection between two services of the same kind. Thus a railroad company contracts with an express company for the carriage of express matter over its lines, and with a connecting carrier for through rates and connected service on traffic passing over both lines.

In the case of a dependant service, it is generally held that the railroad company by contract secures the performance of part of its own duty to the public. The duty recognized is to the public and not, apart from contract, to the express companies. It follows that the railroad company need not make similar arrangements with all express companies. It may make a contract with one company for exclusive express privileges, provided its duty to the public is discharged.[1] The minority view holds the railroads to a duty not to discriminate between express companies.[2] Recent criticism of the prevailing view, however, has granted that the railroad's duty is solely to the public served; but has insisted that the duty is not fully discharged under an exclusive contract. The price charged for a monopoly, it is argued, may be exorbitant, with the result that the express company's charges to the public will be unreasonable.[3] It is submitted that the recognition by the courts that such a contract does not relieve the railroad company from its duty to serve the public, supplies the answer to this objection.[4] The duty being not only to serve, but to serve at a reasonable rate, any contract by the railroad which results in unreasonable prices to the public would seem to violate the railroad's duty.

Contracts between connecting public services for through rates are no part of the duty to serve the public. A public service company is bound to serve only with its own equipment and capital. Such contracts, therefore, are not, apart from statute,[5] subject to governmental regulation, and may

---

[23]Carpenter *v.* Snelling (1867) 97 Mass. 452, 458; Sporrer *v.* Eifler (Tenn. 1870) 1 Heisk. 633; Latham *v.* Smith (1867) 45 Ill. 29, 30.

[24]Warren *v.* Paul (1864) 22 Ind. 276; Walton *v.* Bryenth (N. Y. 1863) 24 How. Prac. 357.

[25]See upholding the tax Chartiers & Robinson Turnpike Co. *v.* McNamara (1872) 72 Pa. 278.

[1]The Express Cases (1886) 117 U. S. 1; Pfister *v.* Central Pac. R. R. Co. (1886) 70 Cal. 169.

[2]McDuffee *v.* Portland & Rochester R. R. (1873) 52 N. H. 430.

[3]Professor Bruce Wyman, 17 Green Bag 570.

[4]See Chicago etc. R.R. Co. *v.* Pullman Car Co. (1891) 139 U. S. 79, 89, 90.

[5]Such a statute was held constitutional in State *ex rel v.* Minneapolis etc. R.R. Co. (1900) 80 Minn. 191, 196, 197. The court in that case relied upon Jacobson *v.* Wisconsin etc. R.R. Co. (1898) 71 Minn. 519. This latter case came before the U. S. Supreme Court; but the question of the constitutionality of the provision was held not to be involved. Wisconsin etc. R.R. Co. *v.* Jacobson (1900) 179 U. S. 287, 295. The provisions of the Hepburn Act, Act of June 29, 1906 C. 3591, are similar.

be exclusive in their terms.[6] This question has recently arisen in respect to telephone companies. In *U. S. Tel. Co.* v. *Central Union Tel. Co.* (1909) 171 Fed. 130, a long-distance telephone company sought by injunction to restrain a rival from inducing local telephone systems under exclusive agreement with the plaintiff for long-distance service, to make connection with the defendant. The injunction was refused on the ground that the exclusive contract was void. The court argued that, granting that the local company could not in the first instance have been compelled to arrange for long-distance service, once it had made a connection with one long-distance company, it must make similar connection with all companies in like situation.[7] This conclusion is based partly upon the ground that there can be no discrimination between long-distance companies, and partly upon the ground that the plaintiff company could not give connection with all the cities reached by the defendant company. The first argument is founded upon a quotation from a late Indiana case, in which this proposition was announced in an elaborate *dictum*.[8] If there be no initial duty to connect with any long-distance company, as the Indiana court concedes upon analogy with the cases already discussed, it would seem to follow that a contract with one company may be exclusive. Any duty to the long-distance companies must be based upon an undertaking by the local company to serve all long-distance companies alike. But the exclusive character of the contract with the plaintiff would surely indicate no such undertaking.[9] Further, this argument would free an unwilling local company from any obligation to secure a long-distance connection; but would require a company which had made a contract for such connection with one company, to treat with all like companies. Such a rule would tend only to discourage a local company from making any contracts for long-distance service.

The second reason advanced by the court—that the local company's subscribers would not receive adequate long-distance service under the contract with the plaintiff—is also open to objection. If the local company owes no duty to contract for long-distance service in the first instance, it is difficult to see how such a duty flows from a contract with the plaintiff. At most it could be said, as in the Indiana case,[8] that service under that contract must be continued. With respect to any *other* long-distance company, the rule that the local company is not under any duty to its subscribers to make long-distance connection, would still apply. The underlying reason for the decision in the instant case, however, would seem to be the peculiar character of telephone service. Through shipment of freight is feasible without a contract between connecting carriers; but the

[6]Atchison, Topeka & Santa Fe R.R. Co. *v.* Denver etc. R.R. Co. (1884) 110 U. S. 667, 680; Coles *v.* Central Co. (1890) 86 Ga. 251, 255. See also People *ex rel v.* Hudson River Tel. Co. (N. Y. 1887) 19 Abb. N. C. 466.

[7]The court also held the contract void as in restraint of trade, upon the principle of cases which condemn as monopolistic contracts which restrain trade and tend to increase prices. It may well be doubted whether the doctrine of monopoly is properly applicable to the law of public service, since prices and service to the public are subject to governmental regulation upon the ground that they are, or tend to be, monopolies. See 6 COLUMBIA LAW REVIEW 259.

[8]State *ex rel v.* Cadwallader (Ind. 1909) 87 N. E. 644. See 9 COLUMBIA LAW REVIEW 560.

[9]See the Express Cases, and Atchison, Topeka & Santa Fe R.R. Co. *v.* Denver etc. R.R. Co. *supra*. The argument of the court, however, is supported in 23 Harv. L. Rev. 54.

effective transmission of a telephone message requires a physical connection between the systems over whose lines the message must travel. If this peculiarity of telephone service be a sufficient reason for distinguishing the carrier cases, the courts might well declare a duty in the first instance to make long-distance connection. But the Indiana case stops short of such a rule; and the principal case itself doubts it. The only logical alternative would seem to be the application of the rule announced in the carrier cases, in the absence of legislative provision similar to the statutes which require connecting carriers to make special arrangements for through traffic.[5]

IDENTIFICATION OF THE *Res* IN CONSTRUCTIVE TRUSTS.—Where funds are given to an agent for a particular purpose, a breach of faith on his part, gives rise to a constructive trust.[1] Equity allows the principal to recover the *res* or its product, so long as it can be identified,[2] and, sometimes aids the *cestui* in sustaining his burden of proof,[3] by means of presumptions. Thus, a deposit of trusts funds to the agent's general bank account, constitutes him a constructive trustee,[4] and, if subsequently, the trustee checks out against this account, a presumption that he was honest and drew out only his own funds arises so as to entitle the *cestui* to a preference. Where the balance in the bank is always greater in amount[5] than, or equal to the trust funds,[6] the court, by means of the presumption of honesty, identifies the fund remaining as the trust fund.[6] Where the balance in the bank is less in amount than the trust fund the presumption attaches to so much as is left,[6] and where the agent draws out approximately the equivalent of the trust fund and buys an article identical with that which he is required to purchase, in the absence of evidence to the contrary, the courts will presume such a purchase to be in execution of the trust, and made with the trust funds.[7] This is simply the converse of the presumption that the agent draws out his personal funds first. If the agent purchases an article different in kind, it cannot be said that he did what he ought to have done.[8] Under such circumstances, his clear duty was to use his personal funds in making the purchase, and the principal is relegated to the presumption that the funds left in the bank are the trust funds.

When the agent dissipates the original fund, and then with his own money purchases an article similar to that which he is requested to buy, it is submitted that no such presumption of honesty can arise. Whenever a trust has been held to attach to the new *res,* the trustee *in fact* gave

---

[1]Perry, Trusts §§166, 206.

[2]Scott *v.* Surman (1742) Willes 400, 404; Burnham *v.* Barth (1895) 89 Wis. 362; Price *v.* Blakemore (1843) 6 Beav. 507; Thompson's Appeal (1853) 22 Pa. St. 16.

[3]*In re* Mulligan (1902) 116 Fed. 715; Taylor *v.* Plumer (1815) 3 M. & Sel. 562, 568; *In re* Marsh (1902) 116 Fed. 396.

[4]*In re* Hallett's Estate (1879) L. R. 13 Ch. Div. 696, 709.

[5]Lewin, Trusts 317. The principle would be entitled to every portion of the mingled property which the agent could not prove to be his own.

[6]*In re* Kurtz (1903) 125 Fed. 992; *In re* Mulligan *supra; In re* Hallett's Estate *supra.*

[7]Perry *v.* Phelips (1798) 4 Vesey 108; Ferris *v.* Van Vechten (1878) 73 N. Y. 113.

[8]Ferris *v.* Van Vechten *supra.*